WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 3509

IN THE MATTER OF: Served June 4, 1990

Formal Complaint of GOLD LINE, INC., Against ALL ABOUT TOWN, INC., et al.) Case No. FC-90-01

On February 20, 1990, Gold Line, Inc. (Gold Line or Complainant) filed a formal complaint against All About Town, Inc., John W. Paris, and Kathleen G. Paris (AAT or Respondents). The complaint alleges, among other things, that Respondents unlawfully conduct widespread transportation of passengers in for-hire charter and special operations between points in the Metropolitan District, without benefit of the authority required by the Compact. Complainant submitted certain documents in support of the complaint and petitioned the Commission to investigate the matters complained of.

By letter dated February 27, 1990, the Commission's Executive Director served a copy of the complaint on Respondents.

On March 5, 1990, Respondents filed a response to the complaint. As relevant here, Respondents state:

> There is only one violation that AAT can possibly be accused of and that is lack of proper authority in some areas. [Response, p. 4, emphasis in original]
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> * * *
>
> All About Town provides service to almost 50 hotels that Gold Line does not and only 12 that Gold Line also serves. All About Town sends out a quarter to a half million brochures a year by direct mail and so generates most of its own business. Tourism was down all over Washington last year due to bad publicity but AAT overcame this with more advertising and better service. [Response, p. 5]

On March 14, 1990, Complainant filed a motion for summary judgment, alleging that Respondents had admitted the charges made by Complainant and that ". . . neither oral hearing nor other proceedings are needed to establish that [Respondents] are guilty of all of the violations of law with which they are charged . . . ." [Motion, p. 2]

On March 27, 1990, counsel for Respondents filed an answer to Complainant's motion for summary judgment, along with a motion to consolidate this complaint proceeding with permanent authority applications also filed by AAT on March 27, 1990, seeking a certificate of public convenience and necessity to conduct charter and special operations between points in the Metropolitan District. On March 27, 1990, AAT also filed an application seeking temporary authority to conduct the same operations.

AAT's answer of March 27, 1990, for reasons unspecified, states in a footnote:

> The Complaint suggests that the owners of AAT are also named as defendants. This pleading treats AAT, the entity performing transportation, as the defendant. [Answer, p. 1, fn. 1]

Also in its answer, AAT states that it:

> . . . believes that the issue of its prior operations without appropriate WMATC authority are properly viewed in the context of its applications for operating authority now filed with WMATC. [Answer, p. 2]

* * *

> Although [AAT] concedes that it has been engaged in motor carrier operations within the Washington Metropolitan District, there is no clear evidence of that fact as complainant alleges. [Answer, p. 3]

* * *

> The statement that Mr. Cummings [of Gold Line] is fully aware of AAT's activities is true, since he has continued to work with All About Town when it suits his company's taste, but now, for reasons not entirely clear, he has turned instead to this Complaint. [Answer, p. 4]

AAT argues that this last item requires a hearing to adduce testimony relevant to the Gold Line allegations and the weight to be accorded them. Accordingly, AAT moves the Commission to consolidate this complaint with its permanent authority applications and asks that the motion for summary judgment be denied.

On April 3, 1990, Complainant filed a motion to strike AAT's answer to the motion for summary judgment on the grounds that Respondents had already filed a response and that the further response was untimely filed.

On April 3, 1990, Complainant also filed a reply to Respondents' motion to consolidate, stating that the next order of business should be a decision on the motion for summary judgment and that the motion to consolidate is premature. Complainant requests that the motion to consolidate be denied or held in abeyance pending a decision in the complaint proceeding.

DISCUSSION AND CONCLUSIONS

This matter is properly before the Commission pursuant to the Compact, Title II, Article XII, Section 13, in that it meets that section's initial provision that:

> Any person may file with the Commission a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provision of this Act, or of any requirement established pursuant thereto.

Complainant alleges, among other things, that Respondents have conducted and continue to conduct transportation for hire of persons between points in the Metropolitan District, in violation of, among other things, the Compact, Title II, Article XII, Section 4(a), which provides in pertinent part:

> No person shall engage in transportation subject to this Act unless there is in force a certificate of public convenience and necessity issued by the Commission authorizing such person to engage in such transportation . . . .

John Paris is the president, and Kathleen Paris is the treasurer/secretary of All About Town, Inc. [Source: Annual Report of All About Town, Inc., for the year ended December 31, 1988.] All About Town, Inc., holds WMATC Certificate of Public Convenience and Necessity No. 131, which authorizes the following:

> SPECIAL OPERATIONS, transporting passengers from 519 Sixth Street, N.W., Washington, D.C., and the Washington Convention Center, 11th and H Streets, N.W., Washington, D.C., to Rosecroft Raceway, Prince George's County, Md., and return.

Certificate No. 131 is narrowly drawn and does not authorize the operations that form the gravamen of this complaint.

Section 13 further provides:

> If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable grounds for an investigation, the Commission shall investigate the matters complained of.

Respondents have not satisfied the complaint. They have neither denied nor refuted the central allegation of unauthorized operations. In fact, as described earlier, in their filings of both March 5, 1990, and March 27, 1990, Respondents made multiple admissions against interest that tend to establish the central material fact in the case. See Kellner v. Whaley, 148 Neb. 259, 27 N.W. 2d 183, 189. Complainant has presented reasonable grounds for an investigation of its complaint, and the Commission concludes that the investigation can be conducted on the basis of the record as filed. In so concluding, we are mindful that Section 13 refers to a hearing:

> At least ten (10) days before the date it sets a time and place for a hearing on a complaint, the Commission shall notify the person complained of that the complaint has been made.
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> * * *
>
> If, after affording to interested persons reasonable opportunity for hearing, the Commission finds in any investigation instituted upon complaint or upon its own initiative, that any person has failed to comply with any provision of this Act or any requirement established pursuant thereto, the Commission shall issue an appropriate order to compel such person to comply therewith.

The first cited reference primarily concerns notice, and there is no challenge in this proceeding as to the adequacy of notice. The complaint was served upon Respondents by the Commission's Executive Director. Respondents have understood and responded to the complaint. The second cited reference concerns whether Respondents have been afforded a reasonable opportunity for hearing. Here the Commission must be concerned with whether its authority is being fairly exercised within the concept of due process of law, whether the issues are clearly defined, and whether Respondent has had the right to present argument and evidence, to cross examine, and to have findings supported by evidence. The Commission so finds.

As to cross examination, the complaint consisted of (1) allegations signed by Charles L. Cummings, Complainant's Vice President and General Manager, to which are appended excerpts from current publications advertising AAT's operations; (2) an affidavit of Jim Hansen, an employee of Complainant, to which is appended AAT's own advertising brochure; and (3) a petition for investigation signed by Complainant's counsel, to which is appended the same advertising brochure of AAT. In its answer of March 27, 1990, AAT states:

> The statement that Mr. Cummings is fully aware of AAT's activities is true, since he has continued to work with All About Town when it suits his company's taste, but now, for reasons not entirely clear, he has turned

> instead to this Complaint. (See, Affidavit of John Paris submitted with AAT temporary authority application.) [Answer, p. 4]

Respondents not only admit that Mr. Cummings is fully aware of AAT's activities but cite the sworn statement of AAT's president in support of the admission. In its response of March 5, 1990, Respondents state:

> If Gold Line persists in its Complaint, the first witness AAT would subpoena is Jim Hansen, whose affidavit is included with the Gold Line Complaint. Gold Line has succeeded in doing what we have been unable to do on our own and that is to provide someone who can testify at a hearing as to our services. You can see from Mr. Hansen's testimony that we provide additional, more personal service than Gold Line. Other than some minor confusion about the model and origin of the bus he rode in, Mr. Hansen's report accurately portrays our company. If his testimony is accepted, it proves a need for our service simply by our continued existence. [Response, p. 4, emphasis supplied]

Respondents admit the essential accuracy of Mr. Hansen's statement and would call upon him for testimony as to the quality of, and need for, AAT's service. Such testimony would be irrelevant to this proceeding. Nor do Respondents dispute the accuracy of the advertisements and brochures appended to the complaint. As noted before, Respondents state:

> All About Town sends out a quarter to a half million brochures a year by direct mail and so generates most of its own business. Tourism was down all over Washington last year due to bad publicity but AAT overcame this with more advertising and better service. [Response, p. 5, emphasis supplied]

Nothing relevant to the gravamen of this complaint is in dispute. There is no legitimate purpose to be served at this time by oral hearing or cross examination. Respondents have had as full and fair a hearing as is required by due process of law.

Given the extent of Respondents' admissions against interest by pleading, it is necessary to rely upon the complaint for little more than allegations. To the extent that the allegations consist partly of Respondents' own advertisements and brochures, even these are tinged with admission, particularly in light of the above-quoted language from page 5 of AAT's Response of March 5, 1990. The Commission notes from these advertisements and brochures the scope of services offered by Respondents, all beyond the limited service authorized by AAT's Certificate No. 131.

All About Town, Inc.

* * *

Sightseeing and charter buses, specializing in sightseeing tours by licensed tour guides. Eight different tours featuring glass top coaches. [Advertisement, Complaint, Appendix A]

* * *

All About Town . . . Sightseeing is our specialty. Day and night tours available, on full-size motor coaches by licensed driver/guides. Featuring the only 53-passenger, glass-top coaches in Washington. Free pickup at most downtown hotels. Free parking at office. Also available for airport transfers and charter service. [Advertisement, Complaint, Appendix B]

AAT's brochure, Appendix A to the affidavit of Jim Hansen, lists the itinerary and prices for eight sightseeing tours. The brochure says, "Rates effective March 10, 1989" and "Copyright 1985."

Based on the record in this case there can be no doubt that Respondents have and are engaged in transportation for hire of persons between points in the Metropolitan District, within the purview of the Compact, Title II, Article XII, Section 1(a), and without a certificate of public convenience and necessity as required by the Compact, Title II, Article XII, Section 4(a). The Commission so finds.

AAT's Certificate No. 131 was issued pursuant to Commission Order No. 2950, served December 17, 1986, in Case No. AP-86-36. John Paris and Kathleen Paris operate the company as a subchapter S corporation. The application in Case No. AP-86-36 contains a sworn statement that ". . . applicant and all principals of applicant's corporation are cognizant of the rules and regulations of the WMATC." Prior to forming AAT, its principals were affiliated with another WMATC carrier, White House Sightseeing Corp., which was subsequently sold. During the public hearing in Case No. AP-86-36 the following exchange took place on cross examination of John Paris by the Commission's counsel:

Witness: . . . I am very familiar with the compact but I certainly couldn't cite the compact verbatim. As far as the rules of the Commission, and the compact, I am very familiar with it having dealt with it at White House Sightseeing for many years.

Q: And the Commission's regulations as well, I would assume?

A: Yes.

Q: And are you willing to comply with the compact and the Commission's rules and regulations?

A: Very willing. [Transcript, pp. 25-26]

WMATC carriers are required to comply with the Compact and the requirements of the Commission thereunder. Because of Respondents' carrier status, experience, and familiarity with the Compact and its requirements, the scope and duration of violations show those violations to be wilful. The Commission so finds. Our task now is to fashion a remedy.

Gold Line's complaint requests that the Commission (1) revoke AAT's Certificate No. 131, (2) order Respondents to cease and desist transportation subject to the Commission's jurisdiction, and/or (3) other or further appropriate action. Complainant's motion for summary judgment requests similar relief.

As quoted previously, Section 13 provides that if the Commission finds that any person has failed to comply with any requirement of the Compact, it shall issue an appropriate order to compel such person to comply. In addition, the Compact, Title II, Article XII, Section 4(g) provides in relevant part:

> Any . . . certificate . . may, upon complaint, . . . after notice and hearing, be suspended, changed, or revoked, . . . for wilful failure to comply with any lawful order, rule, or regulation of the Commission, or with any term, condition, or limitation of such certificate . . . ."

AAT, in its answer of March 27, 1990, asserts the following:

> Under well established regulatory law concepts, the issue of past violations of the law is of course important. Nevertheless, a regulatory agency must consider such past violations not as a basis of punishing the offending carrier but rather in assessing the carrier's willingness to comply with regulatory law in the future. Department of Transportation v. ICC, 710 F.2d 861 (D.C. Cir. 1983). [Answer, p. 6]

The Commission has reviewed the case 1/ cited by Respondents. There, the United States Court of Appeals, District of Columbia Circuit, reviewed the denial of an expanded certificate to James Wilkett, a sole proprietor doing business as Wilkett Trucking Company. The Court states:

> Reviewing this Commission decision, we recognize that this is a unique case. In this instance the Commission was called upon to assess fitness where there was no record of company misdeeds; rather, fitness was at issue only because the sole-proprietor had been convicted of nontransportation related crimes.
>
> * * *

1/ Wilkett v. I.C.C., 710 F.2d 861 (D.C. Cir. 1983).

While the proprietor's fitness may be relevant, the primary focus should be upon the Company's record of operation. 2/ (Emphasis supplied)

* * *

When judging a carrier's fitness in light of past violations, the Commission has consistently applied the following test:

> In determining the fitness issues, consideration must be given to the nature and extent of violations, such mitigating circumstances as might exist, whether the carrier's conduct represents a flagrant and persistent disregard for the provisions of the act, and whether sincere efforts have been made to correct past mistakes.

Greyhound Lines, Inc. v. The Gray Line Scenic Tours, Inc., 121 M.C.C. 242, 265 (1975). 3/

* * *

The Commission has recognized the necessity to carefully consider the nature and extent of violations and any mitigating factors because

> otherwise the denial of a certificate on the basis that the carrier is unfit would be a punitive measure directed only at past unlawful operations, and as a practical matter, amount to retribution, not sound regulation. To avoid this pitfall, consideration of a carrier's fitness should embrace an evaluation of its willingness and ability to comport in the future with the applicable rules and regulations of this Commission.

Eagle Motor Lines, Inc., supra, 107 M.C.C. at 503. 4/

2/ Id. at 863.

3/ Id. at 864.

4/ Id. at 865.

Although the Wilkett case is unique, and notwithstanding the fact that it is easily distinguishable from this proceeding at least to the extent that we have found wilful violations by the operating entity, nevertheless we find the concepts in the Wilkett case useful in fashioning a remedy.

Complainant's motion for summary judgment is hereby granted. Respondents' motion to consolidate this complaint proceeding with the applications tendered for filing on March 27, 1990, is hereby denied. Complainant's motion to strike Respondents' reply to Complainant's motion for summary judgment is hereby denied.

Respondents are hereby directed to cease and desist from transportation covered by the Compact, except to the extent such transportation is authorized by Certificate of Public Convenience and Necessity No. 131. The Commission has determined that suspension or revocation of Certificate No. 131 is not warranted or appropriate at this time. Although Complainant asks that Certificate No. 131 be revoked, there is no evidence that continued conduct of the operation authorized therein would have any adverse effect on Complainant. The Commission believes the operation authorized by Certificate No. 131 is needed. Complainant's interest lies in protecting its lawful and authorized operations from unlawful and unauthorized competition. The Commission believes that the actions taken herein serve the interest of Complainant, the interest of Respondents in continuing lawful operations, and the public interest in securing needed service from properly authorized carriers.

Obviously, then, we do not at this time make a finding that Respondents' are unfit to operate the service authorized in Certificate No. 131. We do, however, make a tentative finding that the wilful, extensive, and long-continued violations found in this case may render Respondents unfit to receive grants of expanded authority such as sought in the applications tendered for filing on March 27, 1990. If continued, such violations would tend to show an unwillingness or inability of Respondents to comply with the requirements of the law and could, for that reason, necessitate the revocation of Certificate No. 131.

In reaching this tentative finding, the Commission is mindful of the nature and extent of the violations. We find no legitimate mitigating circumstances. We are concerned whether these violations show a flagrant and persistent disregard for the law and whether Respondents are willing to correct past practices.

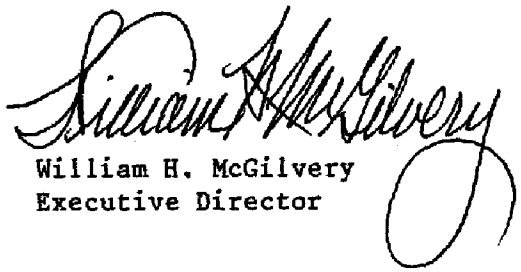
The applications tendered for filing on March 27, 1990, will be held in abeyance for 90 days after the date this order is issued. This will give Respondents an opportunity to show, and the Commission an opportunity to evaluate, Respondents' willingness and ability to comport in the future with the Compact and the Commission's orders, rules, and regulations. Rather than being punitive, the Commission views this remedy as rehabilitative, offering Respondents the opportunity to continue certificated operations and to demonstrate prospective compliance fitness. Not only the Commission, but the

public, Complainant, and other certificated carriers lawfully authorized to conduct operations in which Respondents have engaged, will have an interest in Respondents' future activities and the alacrity with which they respond to the requirements of this order.

This proceeding will remain open. At the end of the 90 days, Respondents will certify to the Commission in detail the steps taken to correct past mistakes, to establish prospective compliance fitness, and the status of their compliance with the Compact and the Commission's requirements thereunder. Respondents will serve a copy of this certification upon counsel for Complainant. Complainant will have five business days to respond. The Commission will consider Respondent's certification, Complainant's response, if any, and such other evidence as is properly before it in this proceeding. At that time the Commission will determine how to proceed with this case and with the applications tendered for filing on March 27, 1990.

IT IS SO ORDERED.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS WORTHY, SCHIFTER, AND SHANNON:



William H. McGilvery
Executive Director